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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958
No. 521

LANCASTER SECURITY INVESTMENT CORPORATION, a California corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING & LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST CO., *et al.,*

Appellees.

JURISDICTIONAL STATEMENT.

MORRIS LAVINE,
215 West Seventh Street,
Los Angeles 14, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellees.

JURISDICTIONAL STATEMENT.

In accordance with paragraph 2 of Rule 13, and Rule 15 of this court, appellant herewith files his jurisdictional statement on appeal.

A.

Official Report Below.

The opinion of the District Court of Appeal is reported in 159 A. C. A. 720, and is an appendix to this jurisdictional statement.

B.

Grounds on Which Jurisdiction of This Court Is Invoked.

(i).

This is an appeal from a judgment upholding the constitutionality of Sections 2924 and 2924(b) of the Civil

Code of the State of California, and Section 692 of the Code of Civil Procedure on the ground that, inherently and as construed and applied in this case, those statutes are unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States in failing to give notice to the holder of a deed of trust that his property is to be sold and forfeited. The case involves the construction and application, inherently and as construed and applied in this case, of these statutory provisions of the State of California regarding notice in a deed of trust and the provisions of the deed of trust as to whether those provisions inure to the benefit of the purchaser of the property with the obligation of the deed of trust, and whether, as construed and applied in this case, the appellant has been accorded due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Three justices of the California Supreme Court—Justices John W. Shenk, B. Rey Schauer and Jesse W. Carter, voted for a hearing of this case.

(ii).

The appeal is pursuant to Title 28, Section 1257 of the United States Code and Rules 10 and 15(e) of the Rules of the Supreme Court of the United States. The judgment below was rendered April 24, 1958, by the Second District, Division Two, of the District Court of Appeal of the State of California. A petition for hearing in the Supreme Court was duly filed and denied by

that court on September 19, 1958, Justices Shenk, Carter and Schauer being of the opinion that the petition should be granted. The hearing was denied on June 17, 1958.

Notice of appeal to this court was duly filed on September 12, 1958, pursuant to Rule 10 of the Rules of this court. Notice of appeal was filed in the District Court of Appeal of the State of California, Second Appellate District, Division Two, the highest court of the State of California which heard the cause and rendered its opinion.

The presiding justice of the District Court of Appeal, Second Appellate District, Division II, The Honorable W. Turney Fox, extended the time for docketing the record because of amplification of the record, and intervening holidays, to November 26, 1958.

(iii).

The statutory provisions believed to confer jurisdiction on this court are the Fourteenth Amendment to the Constitution of the United States in its due process clause and Title 28, Section 1257 and Sections 2101 and 2104, United States Code.

(iv).

Cases believed to sustain jurisdiction:

Stromberg v. California, 283 U. S. 359;

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 313;

Grannis v. Ordean, 234 U. S. 385-394, 58 L. Ed. 1363, 1368;

Scott v. Paisley, 271 U. S. 632, 70 L. Ed. 1123;

New York v. N. Y., N. H. & H. RR. Co., 344 U. S. 293, 97 L. Ed. 333.

Statutes Involved.

Fourteenth Amendment to the Constitution of the United States:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

Civil Code, State of California:

> "§2924. Transfer as security, mortgage or pledge; power of sale, restrictions on exercise; notice of default and election to sell; waiting period; notice of sale.
>
> Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences

of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution."

Civil Code, State of California:

"§2924b. Request for copies, notices of default and of sale.

Request; recording; contents; form. Any persons desiring a copy of any notice of default and of any notice of sale under any deed of trust or mortgage with power of sale upon real property, as to which deed of trust or mortgage the power of sale cannot be exercised until such notices are given for the time and in the manner provided in Section 2924 may, at any time subsequent to the recordation or registration of such deed of trust or mortgage and prior to recordation of notice of default thereunder, cause

to be filed for record in the office of the recorder of any county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any such notice of default and of sale. This request shall set forth the name and address of the persons requesting copies of such notices, shall identify the deed of trust of mortgage by stating the names of the parties thereto, the date of recordation or registration thereof and the book and page where the same is recorded or the recorder's or registrar's serial number and shall be in substantially the following form:

'In accordance with Section 2924b, Civil Code, request is hereby made that a copy of any notice of default and a copy of any notice of sale under the deed of trust (or mortgage) recorder ....., 19...., in Book ..... page ..... records of ..... County, (or filed for record with recorder's serial number ....., or registered under registrar's number ..... County) California, executed by ..... as trustor (or mortgagor) in which ....., is named as beneficiary (or mortgagee) and ..... as trustee be mailed to ..... at .....

Signature .....'

Recorder's duties. Immediately upon the filing for record of such request, the recorder shall enter upon the margin of the record of the deed of trust or mortgage therein referred to a reference to the place where such request is recorded, which reference shall be substantially in the following form:

'Request recorded in Book ..... page ..... of ..... for copy of notice of default and sale.'

Mailing notice. The mortgagee, trustee or other person authorized to record the notice of default, shall within 10 days following recordation of such notice of default deposit or cause to be deposited in

the United States mail an envelope, registered and with postage thereon, addressed to each person whose name and address are set forth in a duly recorded request therefor, and a reference to which request has, prior to recordation of said notice of default, been entered on the margin of the record of the deed of trust or mortgage, directed to the address designated in said request, and at least 20 days before date of sale the mortgagee, trustee or other persons authorized to make the sale shall deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor recorded, within the time herein provided, a reference to which request has been entered upon the record as above provided at the address set forth in such request.

Request in instrument; publication; service. Any deed of trust or mortgage with power of sale hereafter executed upon real property may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to any person a party thereto at the address of such person given therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as herein authorized. If, in any deed of trust or mortgage with power of sale hereafter executed, except a deed of trust or mortgage of any of the classes excepted from the provisions of Section 2924, no address of the trustor or mortgagor is therein set forth and if no request for notice by such trustor or mortgagor has been recorded as herein provided, a copy of the notice of default shall be published once a week

for at least four weeks in a newspaper of general circulation in the county in which the property is situated, such publication to commence within 10 days after the filing of the notice of default. In lieu of such publication a copy of the notice of default may be delivered personally to the trustor or mortgagor within such 10 days or at any time before publication is completed.

Recital or evidence of compliance. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or of personal delivery of the copy of the notice of default shall constitute prima facie evidence of compliance therewith and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Effect of request upon title or as notice. No request for copy of any notice filed for record pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any person requesting copies of notice has or claims any right, title or interest in, or lien or charge upon the property described in the deed of trust or mortgage referred to therein."

Code of Civil Procedure, State of California:

"§692. Sale on execution or under power in mortgage or deed of trust; notice

Before the sale of property on execution or under power contained in any mortgage or deed of trust, notice thereof must be given as follows:

. . .

3. Real estate. In case of real property: by posting a similar notice particularly describing the prop-

erty at least 20 days before date of sale, in one public place in the city where the property is to be sold if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold and publishing a copy thereof once a week for the same period, in some newspaper of general circulation printed and published in the city in which the property or some part thereof is situated, if any part thereof is situated in a city, if not, then in some newspaper of general circulation printed and published in the judicial district in which the property or some part thereof is situated, or, in case no newspaper of general circulation be printed and published in the city or judicial district, as the case may be, in some newspaper of general circulation printed and published in the county. Provided, that where real property is to be sold under power of sale contained in any deed of trust or under power of sale contained in a mortgage a copy of said notice shall be posted in some conspicuous place on the property to be sold, at least 20 days before date of sale.

. . ."

C.

Questions Presented by This Appeal.

This appeal presents the questions of proper notice before real estate may be sold under power of sale in a deed of trust and the validity of Sections 2924 and 2924b of the Civil Code and Section 692 of the Code of Civil Procedure of the State of California inherently and as construed and applied in this case.

Those sections provide for form and matter of notice to exercise a power of sale in a deed of trust. Section 2924b is a section passed after the depression of 1930 and

provides for notice if one files a request for the same with the county recorded of the county where the property is located, but not otherwise.

The appellant bought a valuable piece of property which the complaint alleges to be worth $60,000.00 which had a deed of trust upon it on which, at the time of sale, there was less than $3,000.00 owing. The original deed of trust made a request and contained a provision in it that the original purchaser was to receive notice of sale in the event a sale was proposed. Paragraph 7b of the deed of trust provided: "This deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns." It is conceded that the appellant did not file a request for notice himself under the provisions of Section 2924b, but his predecessor, the purchaser, did, and it is his contention that the sale of the property to him inured the benefits of that paragraph also to him, entitling him to notice of the sale. It is conceded that *no notice was given to him* before the property was sold. Furthermore, the same trustee who handled the original purchase and sale also handled the sale to the appellant and knew his name and address but did not forward or send him any notice. The questions presented in this case are then as follows:

1. Whether the appellant's valuable property, alleged in the complaint to be worth at least $60,000.00, could be taken from him and sold under a power of sale without notice to him in some form of the proposed sale; whether without such notice, he was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether, insofar as Section 2924b is construed to require only notice to the person who files a request therefor with the county clerk, that such a statute, as thus construed and applied, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether Section 2924b requiring four weeks notice by publication if appellant was not personally served, must be read into the contract of purchase and sale and the failure to so publish voids the transaction.

4. Whether a statute which provides for notice only by newspaper publication, when the person who should receive it, is known to the trustee, and his name and address are known, is valid, and is due process under the Fourteenth Amendment to the United States Constitution.

In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 313, the court said:

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. . . ." The fundamental requisite of due process of law is the opportunity to be heard. "Grannis v. Ordean, 234 U. S. 385, 394, 58 L. Ed. 1363, 1368. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

The court there held that the provisions of the New York statute by publication four times, once a week for four weeks, were insufficient to comply with due process. The statutory notice, the United States Supreme Court said, was inadequate because under the circumstances it is not reasonably calculated to reach those who could

easily be informed by other means at hand. *It held that the trust company could easily give postal notification to known beneficiaries.*[1] The court held that where the names of beneficiaries are in the trust company's files that they are entitled to receive notice and that the law failing to provide to give such notice depriving known persons, whose whereabouts are also known, of substantial property rights is incompatible with the requirements of the Fourteenth Amendment.

In *New York v. N. Y., N. H. & H. R.R. Co.*, 344 U. S. 293, 97 L. Ed. 333, the court said, speaking of notice:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865."

The court there held that in a bankruptcy proceeding the law requires proper persons to file a list of all known creditors, the amount and character of their claims and their last known postoffice addresses. This was not done. The court further said that non-appearing known creditors were entitled to service by mail. The court said:

> "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York has not been accorded that kind of notice."

Neither has the plaintiff in this action.

---

[1]In the case at bar the appellee, the trustee, was the same trustee in both the original transaction and the purchase by appellant, and knew his name and address. The court below held this did not require any duty on his part to notify appellant.

In *Mullane v. Central Hanover Bank & Trust Co.*, the court held that:

> "But when notice is a person's due, process which is a mere gesture, is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The procedure adopted herein then, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The procedure followed in this case was upheld by the court below. It follows, then, that Section 2924b of the Civil Code, inherently and as construed and applied in this case violates the Fourteenth Amendment to the United States Constitution. The court below has construed the statute to require *no* notice to the new purchaser of property upon a sale under a deed of trust if the new purchaser did not file any request with the county recorder.

Reasonable notice is always required to comply with the due process provisions of the Fourteenth Amendment.

> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306-320.

The District Court of Appeal cited *Scott v. Paisley*, 271 U. S. 632, 70 L. Ed. 1123, which was decided June 7 1926, and prior to the passage of Section 2924b of the Civil Code of California. The cases therein cited in no wise pertain to the case here. In *Scott v. Paisley*, the Court says:

> "Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject to a mortgage or trust deed, with a contractual power of sale."

The court below overlooked the fact that the deed of trust contained paragraph B7 which inured all benefits of the original purchaser to the new purchaser. Section 2924b, insofar as it requires notice by publication for at least four weeks to one who did not personally applv for a copy of a notice of default, must therefore be read into the deed of trust and here there was a non-compliance with the four weeks notice.

The *Paisley* case also did not consider the provisions contained in the instant deed of trust that the deed of trust applies and inures to the benefit of successors and assigns by contract. Then the rights of the purchaser of the property which were originally had by the original trustor passed to him. To so construe the application of the statute would be to construe it constitutionally in accordance with due process. We respectfully submit that the District Court of Appeal has not construed Section 2924b at all and that it is subsequent to the cases cited by the District Court, to wit, *Davidow v. Lachman Brothers,* 76 F. 2d 186 and 188, and *Curti v. Pacific Mtg. Guaranty Co.,* 87 F. 2d 42, 43. These cases were both prior to 1939 when Section 2924b required specific notice by publication at least four weeks before there could be any valid transfer or sale of the property and without which there was inadequate notice. Construed otherwise this section would be violative of the due process clause of the Fourteenth Amendment requiring adequate notice.

Since the issue of due notice in trust deeds and powers of sale are highly important, this is a case of plenary action which affects a large number of people. Three Justices on the Supreme Court of California, Justices Shenck, Schauer and Carter, thought that the case should

be heard by that court, and that it had plenary importance. We respectfully urge this court to review and reverse the judgment below. The questions are substantial.

Zucht v. King, 260 U. S. 174, 176, 177.

Issue of due process and the construction of these statutes inherently and as construed and applied in this case were first raised in the District Court of Appeal, Second Appellate District, State of California, and the challenge to the constitutionality was denied by that court. It was again raised in petition for hearing before the Supreme Court and was denied by that court. (See Minutes of Supreme Court.)

Notice by Advertisement Insufficient to Known Purchaser.

The notice by advertisement, when the person entitled to notice is known to the trustee, and in fact handled his purchase through the same trustee, as is foreclosing on him, is a poor substitute for actual notice in person or by mail, and is not due process guaranteed by the Fourteenth Amendment, United States Constitution.

Mullane v. Hanover Bank and Trust Co., 339 U. S. 306.

In this case the same trustee handled the original deed, and the new deed. He knew the address and whereabouts of the new purchaser. To fail to give him notice in person or by mail and then to sell his $60,000 property for $3,000 is certainly not due process guaranteed by the United States Constitution.

As thus construed and applied Sections 2924, 2924B, Civil Code of California, violate the Fourteenth Amendment, United States Constitution.

Failure of Notice by Publication for Four Weeks Void.

Section 2924B, Civil Code of California, must be deemed read into every contract. It provides that if there is service by publication, it must be at least once a week for four weeks. The trust deed notice of proposed sale alleges publication for only twenty days. Such notice, even by publication, therefore was inadequate to comply with due process guaranteed by the Fourteenth Amendment, United States Constitution.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Lancaster Security Investment Corporation, a California corporation, Plaintiff and Appellant vs. Howard M. Kessler, State Mutual Building & Loan Association, a California corporation, State Mutual Building & Loan Association, a California corporation, doing business as State Mutual Savings and Loan Association and Title Insurance and Trust Company, a corporation, Defendants.

Howard M. Kessler, State Mutual Savings & Loan Association and Title Insurance and Trust Company, Respondents. Civ. No. 22532.

Filed April 24, 1958.

Appeal from judgment and orders of the Superior Court of Los Angeles County. Arnold Praeger, Judge. Appeal from orders dismissed. Judgment affirmed.

For Appellant Lancaster Security Investment Corp.: Morris Lavine.

For Respondents Howard M. Kessler and Title Insurance and Trust Company: Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., George R. Pfeiffer.

For Respondent Howard M. Kessler: John J. Guerin.

The sole issue presented by this appeal concerns the validity of a foreclosure sale conducted by the trustee under the power of sale contained in a deed of trust. The judgment under review was rendered after a ruling which sustained defendants' objection to the introduction of any evidence. Therefore, we are called upon to decide the

Code of the State of California, and Section 692 of the Code of Civil Procedure on the ground that, inherently and as construed and applied in this case, those statutes are unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States in failing to give notice to the holder of a deed of trust that his property is to be sold and forfeited. The case involves the construction and application, inherently and as construed and applied in this case, of these statutory provisions of the State of California regarding notice in a deed of trust and the provisions of the deed of trust as to whether those provisions inure to the benefit of the purchaser of the property with the obligation of the deed of trust, and whether, as construed and applied in this case, the appellant has been accorded due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Three justices of the California Supreme Court—Justices John W. Shenk, B. Rey Schauer and Jesse W. Carter, voted for a hearing of this case.

(ii).

The appeal is pursuant to Title 28, Section 1257 of the United States Code and Rules 10 and 15(e) of the Rules of the Supreme Court of the United States. The judgment below was rendered April 24, 1958, by the Second District, Division Two, of the District Court of Appeal of the State of California. A petition for hearing in the Supreme Court was duly filed and denied by

that court on September 19, 1958, Justices Shenk, Carter and Schauer being of the opinion that the petition should be granted. The hearing was denied on June 17, 1958.

Notice of appeal to this court was duly filed on September 12, 1958, pursuant to Rule 10 of the Rules of this court. Notice of appeal was filed in the District Court of Appeal of the State of California, Second Appellate District, Division Two, the highest court of the State of California which heard the cause and rendered its opinion.

The presiding justice of the District Court of Appeal, Second Appellate District, Division II, The Honorable W. Turney Fox, extended the time for docketing the record because of amplification of the record, and intervening holidays, to November 26, 1958.

(iii).

The statutory provisions believed to confer jurisdiction on this court are the Fourteenth Amendment to the Constitution of the United States in its due process clause and Title 28, Section 1257 and Sections 2101 and 2104, United States Code.

(iv).

Cases believed to sustain jurisdiction:

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> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
> . . ."

Civil Code, State of California:

> "§2924. Transfer as security, mortgage or pledge; power of sale, restrictions on exercise; notice of default and election to sell; waiting period; notice of sale.
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> Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences

of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution."

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to be filed for record in the office of the recorder of any county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any such notice of default and of sale. This request shall set forth the name and address of the persons requesting copies of such notices, shall identify the deed of trust of mortgage by stating the names of the parties thereto, the date of recordation or registration thereof and the book and page where the same is recorded or the recorder's or registrar's serial number and shall be in substantially the following form:

'In accordance with Section 2924b, Civil Code, request is hereby made that a copy of any notice of default and a copy of any notice of sale under the deed of trust (or mortgage) recorder ....., 19...., in Book ..... page ..... records of ..... County, (or filed for record with recorder's serial number ....., or registered under registrar's number ..... County) California, executed by ..... as trustor (or mortgagor) in which ....., is named as beneficiary (or mortgagee) and ..... as trustee be mailed to ..... at .....

Signature .....'

Recorder's duties. Immediately upon the filing for record of such request, the recorder shall enter upon the margin of the record of the deed of trust or mortgage therein referred to a reference to the place where such request is recorded, which reference shall be substantially in the following form:

'Request recorded in Book ..... page ..... of ..... for copy of notice of default and sale.'

Mailing notice. The mortgagee, trustee or other person authorized to record the notice of default, shall within 10 days following recordation of such notice of default deposit or cause to be deposited in

the United States mail an envelope, registered and with postage thereon, addressed to each person whose name and address are set forth in a duly recorded request therefor, and a reference to which request has, prior to recordation of said notice of default, been entered on the margin of the record of the deed of trust or mortgage, directed to the address designated in said request, and at least 20 days before date of sale the mortgagee, trustee or other persons authorized to make the sale shall deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor recorded, within the time herein provided, a reference to which request has been entered upon the record as above provided at the address set forth in such request.

Request in instrument; publication; service. Any deed of trust or mortgage with power of sale hereafter executed upon real property may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to any person a party thereto at the address of such person given therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as herein authorized. If, in any deed of trust or mortgage with power of sale hereafter executed, except a deed of trust or mortgage of any of the classes excepted from the provisions of Section 2924, no address of the trustor or mortgagor is therein set forth and if no request for notice by such trustor or mortgagor has been recorded as herein provided, a copy of the notice of default shall be published once a week

for at least four weeks in a newspaper of general circulation in the county in which the property is situated, such publication to commence within 10 days after the filing of the notice of default. In lieu of such publication a copy of the notice of default may be delivered personally to the trustor or mortgagor within such 10 days or at any time before publication is completed.

Recital or evidence of compliance. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or of personal delivery of the copy of the notice of default shall constitute prima facie evidence of compliance therewith and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Effect of request upon title or as notice. No request for copy of any notice filed for record pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any person requesting copies of notice has or claims any right, title or interest in, or lien or charge upon the property described in the deed of trust or mortgage referred to therein."

Code of Civil Procedure, State of California:

"§692. Sale on execution or under power in mortgage or deed of trust; notice

Before the sale of property on execution or under power contained in any mortgage or deed of trust, notice thereof must be given as follows:

. . .

3. Real estate. In case of real property: by posting a similar notice particularly describing the prop-

erty at least 20 days before date of sale, in one public place in the city where the property is to be sold if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold and publishing a copy thereof once a week for the same period, in some newspaper of general circulation printed and published in the city in which the property or some part thereof is situated, if any part thereof is situated in a city, if not, then in some newspaper of general circulation printed and published in the judicial district in which the property or some part thereof is situated, or, in case no newspaper of general circulation be printed and published in the city or judicial district, as the case may be, in some newspaper of general circulation printed and published in the county. Provided, that where real property is to be sold under power of sale contained in any deed of trust or under power of sale contained in a mortgage a copy of said notice shall be posted in some conspicuous place on the property to be sold, at least 20 days before date of sale.

. . ."

C.

Questions Presented by This Appeal.

This appeal presents the questions of proper notice before real estate may be sold under power of sale in a deed of trust and the validity of Sections 2924 and 2924b of the Civil Code and Section 692 of the Code of Civil Procedure of the State of California inherently and as construed and applied in this case.

Those sections provide for form and matter of notice to exercise a power of sale in a deed of trust. Section 2924b is a section passed after the depression of 1930 and

provides for notice if one files a request for the same with the county recorded of the county where the property is located, but not otherwise.

The appellant bought a valuable piece of property which the complaint alleges to be worth $60,000.00 which had a deed of trust upon it on which, at the time of sale, there was less than $3,000.00 owing. The original deed of trust made a request and contained a provision in it that the original purchaser was to receive notice of sale in the event a sale was proposed. Paragraph 7b of the deed of trust provided: "This deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns." It is conceded that the appellant did not file a request for notice himself under the provisions of Section 2924b, but his predecessor, the purchaser, did, and it is his contention that the sale of the property to him inured the benefits of that paragraph also to him, entitling him to notice of the sale. It is conceded that *no notice was given to him* before the property was sold. Furthermore, the same trustee who handled the original purchase and sale also handled the sale to the appellant and knew his name and address but did not forward or send him any notice. The questions presented in this case are then as follows:

1. Whether the appellant's valuable property, alleged in the complaint to be worth at least $60,000.00, could be taken from him and sold under a power of sale without notice to him in some form of the proposed sale; whether without such notice, he was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether, insofar as Section 2924b is construed to require only notice to the person who files a request therefor with the county clerk, that such a statute, as thus construed and applied, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether Section 2924b requiring four weeks notice by publication if appellant was not personally served, must be read into the contract of purchase and sale and the failure to so publish voids the transaction.

4. Whether a statute which provides for notice only by newspaper publication, when the person who should receive it, is known to the trustee, and his name and address are known, is valid, and is due process under the Fourteenth Amendment to the United States Constitution.

In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 313, the court said:

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. . . ." The fundamental requisite of due process of law is the opportunity to be heard. "Grannis v. Ordean, 234 U. S. 385, 394, 58 L. Ed. 1363, 1368. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

The court there held that the provisions of the New York statute by publication four times, once a week for four weeks, were insufficient to comply with due process. The statutory notice, the United States Supreme Court said, was inadequate because under the circumstances it is not reasonably calculated to reach those who could

easily be informed by other means at hand. *It held that the trust company could easily give postal notification to known beneficiaries.*[1] The court held that where the names of beneficiaries are in the trust company's files that they are entitled to receive notice and that the law failing to provide to give such notice depriving known persons, whose whereabouts are also known, of substantial property rights is incompatible with the requirements of the Fourteenth Amendment.

In *New York v. N. Y., N. H. & H. R.R. Co.*, 344 U. S. 293, 97 L. Ed. 333, the court said, speaking of notice:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865."

The court there held that in a bankruptcy proceeding the law requires proper persons to file a list of all known creditors, the amount and character of their claims and their last known postoffice addresses. This was not done. The court further said that non-appearing known creditors were entitled to service by mail. The court said:

> "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York has not been accorded that kind of notice."

Neither has the plaintiff in this action.

---

[1]In the case at bar the appellee, the trustee, was the same trustee in both the original transaction and the purchase by appellant, and knew his name and address. The court below held this did not require any duty on his part to notify appellant.

In *Mullane v. Central Hanover Bank & Trust Co.*, the court held that:

> "But when notice is a person's due, process which is a mere gesture, is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The procedure adopted herein then, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The procedure followed in this case was upheld by the court below. It follows, then, that Section 2924b of the Civil Code, inherently and as construed and applied in this case violates the Fourteenth Amendment to the United States Constitution. The court below has construed the statute to require *no* notice to the new purchaser of property upon a sale under a deed of trust if the new purchaser did not file any request with the county recorder.

Reasonable notice is always required to comply with the due process provisions of the Fourteenth Amendment.

> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306-320.

The District Court of Appeal cited *Scott v. Paisley*, 271 U. S. 632, 70 L. Ed. 1123, which was decided June 7, 1926, and prior to the passage of Section 2924b of the Civil Code of California. The cases therein cited in no wise pertain to the case here. In *Scott v. Paisley*, the Court says:

> "Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject to a mortgage or trust deed, with a contractual power of sale."

The court below overlooked the fact that the deed of trust contained paragraph B7 which inured all benefits of the original purchaser to the new purchaser. Section 2924b, insofar as it requires notice by publication for at least four weeks to one who did not personally apply for a copy of a notice of default, must therefore be read into the deed of trust and here there was a non-compliance with the four weeks notice.

The *Paisley* case also did not consider the provisions contained in the instant deed of trust that the deed of trust applies and inures to the benefit of successors and assigns by contract. Then the rights of the purchaser of the property which were originally had by the original trustor passed to him. To so construe the application of the statute would be to construe it constitutionally in accordance with due process. We respectfully submit that the District Court of Appeal has not construed Section 2924b at all and that it is subsequent to the cases cited by the District Court, to wit, *Davidow v. Lachman Brothers,* 76 F. 2d 186 and 188, and *Curti v. Pacific Mtg. Guaranty Co.,* 87 F. 2d 42, 43. These cases were both prior to 1939 when Section 2924b required specific notice by publication at least four weeks before there could be any valid transfer or sale of the property and without which there was inadequate notice. Construed otherwise this section would be violative of the due process clause of the Fourteenth Amendment requiring adequate notice.

Since the issue of due notice in trust deeds and powers of sale are highly important, this is a case of plenary action which affects a large number of people. Three Justices on the Supreme Court of California, Justices Shenck, Schauer and Carter, thought that the case should

be heard by that court, and that it had plenary importance. We respectfully urge this court to review and reverse the judgment below. The questions are substantial.

Zucht v. King, 260 U. S. 174, 176, 177.

Issue of due process and the construction of these statutes inherently and as construed and applied in this case were first raised in the District Court of Appeal, Second Appellate District, State of California, and the challenge to the constitutionality was denied by that court. It was again raised in petition for hearing before the Supreme Court and was denied by that court. (See Minutes of Supreme Court.)

Notice by Advertisement Insufficient to Known Purchaser.

The notice by advertisement, when the person entitled to notice is known to the trustee, and in fact handled his purchase through the same trustee, as is foreclosing on him, is a poor substitute for actual notice in person or by mail, and is not due process guaranteed by the Fourteenth Amendment, United States Constitution.

Mullane v. Hanover Bank and Trust Co., 339 U. S. 306.

In this case the same trustee handled the original deed, and the new deed. He knew the address and whereabouts of the new purchaser. To fail to give him notice in person or by mail and then to sell his $60,000 property for $3,000 is certainly not due process guaranteed by the United States Constitution.

As thus construed and applied Sections 2924, 2924B, Civil Code of California, violate the Fourteenth Amendment, United States Constitution.

Failure of Notice by Publication for Four Weeks Void.

Section 2924B, Civil Code of California, must be deemed read into every contract. It provides that if there is service by publication, it must be at least once a week for four weeks. The trust deed notice of proposed sale alleges publication for only twenty days. Such notice, even by publication, therefore was inadequate to comply with due process guaranteed by the Fourteenth Amendment, United States Constitution.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Lancaster Security Investment Corporation, a California corporation, Plaintiff and Appellant vs. Howard M. Kessler, State Mutual Building & Loan Association, a California corporation, State Mutual Building & Loan Association, a California corporation, doing business as State Mutual Savings and Loan Association and Title Insurance and Trust Company, a corporation, Defendants.

Howard M. Kessler, State Mutual Savings & Loan Association and Title Insurance and Trust Company, Respondents. Civ. No. 22532.

Filed April 24, 1958.

Appeal from judgment and orders of the Superior Court of Los Angeles County. Arnold Praeger, Judge. Appeal from orders dismissed. Judgment affirmed.

For Appellant Lancaster Security Investment Corp.: Morris Lavine.

For Respondents Howard M. Kessler and Title Insurance and Trust Company: Lawrence L. Otis, Gilbert E. Harris, James F. Healey, Jr., George R. Pfeiffer.

For Respondent Howard M. Kessler: John J. Guerin.

The sole issue presented by this appeal concerns the validity of a foreclosure sale conducted by the trustee under the power of sale contained in a deed of trust. The judgment under review was rendered after a ruling which sustained defendants' objection to the introduction of any evidence. Therefore, we are called upon to decide the

purely legal question whether the complaint stated a cause of action, that is to say, whether the facts alleged afforded any legal ground upon which to hold the trustee's sale invalid. Accordingly, the facts will be stated largely in the language of the complaint.

The deed of trust in question, which is conventional in form, was executed on January 19, 1950, by Mr. and Mrs. Eilers, plaintiff's predecessors in interest, to secure their obligation to repay a loan made by defendant State Mutual Building and Loan Association. The parties to the instrument were: (1) the Eilers as borrowers and "trustors", (2) defendant State Mutual as lender and "beneficiary", and (3) defendant Title Insurance and Trust Company as "trustee."

On April 27, 1953, appellant (plaintiff below) purchased the encumbered real property from the trustors and assumed the obligation secured by the trust deed. According to the complaint, State Mutual "was notified that said property was transferred to plaintiff and that plaintiff assumed the payment of the obligation under said deed of trust, and was further notified that plaintiff's address was Box 987, Lancaster, California."

Thereafter, a default occurred whereupon State Mutual executed a declaration of default and election to sell. Pursuant thereto the trustee proceeded to exercise the power of sale. At the trustee's sale held on April 18, 1956, defendant Kessler purchased the property for $3000. It is alleged that on the date of sale "there was due and unpaid under said deed of trust . . . a sum less than $2000" and that "the reasonable value of said . . . property is between $50,000 and $60,000." Apart from allegations concerning plaintiff's offers fully to reimburse the purchaser and to pay any and all additional sums that

might be deemed equitable, the following is the only other consequential allegation of fact to be found in the complaint: "That neither the plaintiff, nor any of its officers, received notice of the trustee's sale." The prayer of the complaint sought a judgment declaring the trustee's sale to be null and void and quieting appellant's title.

It is recited in the judgment that "counsel for plaintiff having stated no additional facts could be alleged in an amended pleading" defendants' objection to the introduction of any evidence was sustained.

Appellant's major contention appears to be that since the original trustors were entitled to have notice of sale mailed to them at their address as given in the trust deed, and since the beneficiary had been notified of appellant's acquisition of the property, and of appellant's address, appellant, as successor in interest to the original trustors, was entitled "to specific notice under section 2924b of the Civil Code."

This contention is untenable. The only requirements of notice of sale essential to the validity of a sale under a power contained in a deed of trust are those expressly and specifically prescribed by the terms of the instrument and by the provisions of the applicable statutes. (Ley v. Babcock, 118 Cal. App. 525, 528-529; Billings v. Farm Development Company, 74 Cal. App. 254, 264; Meyer v. Zuber, 92 Cal. App. 767, 772-773; Sargent v. Shumaker, 193 Cal. 122-130.)

As stated in 34 Cal. Jur. 2d, §454, p. 128: "Not less than 3 months after notice of default is given, the trustee, mortgagee, or beneficiary must give notice of sale, stating the time and place thereof in the manner required for sales of real property on execution. A notice that does not meet the statutory requirements is invalid. *But*

no additional notice need be given. Except where he formally requests notice, the fact that the debtor is not personally notified is immaterial, so long as there is compliance with the conditions prescribed in the statute." (Emphasis added.)

The same contention as that made by appellant here was rejected in Ley v. Babcock, *supra*, 118 Cal. App. 525, 528, in the following language: "The trial court found that notice was given in full compliance with the terms of the deed of trust and with the provisions of Section 692 of the Code of Civil Procedure. It was *not at any time necessary that personal notice be served upon the appellants;* it is sufficient if the statute and the terms of the trust deed are followed. (Witter v. Bank of Milpitas, 204 Cal. 570, 573, and cases cited.)" (Emphasis added.)

Section 2924 of the Civil Code provides that after other specified procedural steps have been taken in the exercise of a power of sale, the trustee "shall give notice of sale stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution." Section 692 of the Code of Civil Procedure specifically prescribes the notice which must be given before the sale of property under execution or under a power contained in a deed of trust. The deed of trust involved in the present case contains the request of the trustors that a copy of any notice of default and a copy of any notice of sale be mailed to them at their given address as provided for in Civil Code section 2924b. The latter section contains provisions whereby any person desiring a copy of any notice of default and of any notice of sale under a trust deed may file with the County Recorder a request therefor containing certain data as prescribed by the statute.

Appellant expressly concedes that it filed no request for notice under the provisions of section 2924b. The instrument here involved contains no other provisions for notice which would add to the requirements of the statutes. Appellant did not allege, nor does appellant assert on this appeal that it could allege, that there was any failure to give any notice required by the applicable statutes.

Appellant's opening brief betrays a gross misunderstanding of the procedural provisions for the foreclosure of trust deeds by exercise of the power of sale. After calling attention to the fact that the trustee's deed (attached as an exhibit to the complaint) recited publication of the *notice of sale* once a week during a period of *twenty days*, appellant quotes a portion of section 2924b requiring (under conditions not present here) publication of the *notice of default* once a week for at least *four weeks*. Appellant thereupon draws the obviously false conclusion that the publication of the notice of sale once a week during a period of twenty days was inadequate. The plain language of section 692 of the Code of Civil Procedure is a clear refutation. Furthermore, there was no occasion for any publication of the notice of default in this case because the address of the trustors was set forth in the deed of trust and their request for a copy of the notice was contained therein.

Equally unsound is the contention that the "due process" clauses of the State and Federal Constitutions entitled appellant to special or personal notice of the trustee's sale. In Scott v. Paisley, 271 U. S. 632, 70 L. Ed. 1123, the appealing plaintiff challenged the validity of a Georgia statute providing for summary enforcement of an instrument in the nature of a trust deed, but known in

Georgia as a "security deed." Plaintiff in that case, like the appellant here, was successor in interest to the grantor under the security deed. The United States Supreme Court rejected plaintiff's contention that the statute providing for a foreclosure of the plaintiff's interest in the land through a proceeding to which she was not a party, and without notice, was in conflict with the due process and equal protection clauses of the Fourteenth Amendment. The following excerpts from the opinion appear to be particularly pertinent (271 U. S. at pages 635 and 636):

"In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale, is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. . . . So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power. And §6037 neither deprives him of property without due process of law nor denies him the equal protection of the laws."

The United States Court of Appeals for the Ninth Circuit has specifically held that the provisions of section 2924 of our Civil Code are not in conflict with the due process clause of the Federal Constitution. (Davidow v. Lachman Bros. Inv. Co., 76 Fed. 2d 186, 188; Curti v. Pacific Mortgage Guaranty Co., 87 Fed. 2d 42, 43.) Appellant has cited no decision, state or federal, which tends to support its position in this regard.

Appellant further contends that under the facts here alleged, it would be violative of the due process clause of the Fourteenth Amendment to apply the rule that all facts recited in the trustee's deed affecting the regularity of the sale are conclusively presumed to be true. This rule has been applied in a legion of California cases. It is sufficient to cite Central Nat. Bank v. Bell, 5 Cal. 2d 324, 326; Cobb v. California Bank, 6 Cal. 2d 389, 390; Karrell v. First Thrift of Los Angeles, 104 Cal. App. 2d 536, 539; Abrahamer v. Parks, 141 Cal. App. 2d 82, 84.

However, the short answer to this contention is that it is not necessary to invoke any conclusive presumption in order to sustain the present judgment. Appellant has not alleged the existence of any fact which indicates the slightest irregularity in the sale at which defendant Kessler was the purchaser. There is no allegation that Kessler had any relationship to the transaction other than that of being a purchaser. There is no allegation of any fact which would place Kessler in any position other than that of a bona fide purchaser for value without notice. (Karrell v. First Thrift of Los Angeles, *supra*, 104 Cal. App. 2d 536, 539.)

Appellant's allegations to the effect that there was great disparity between the value of the property and the amount for which it was sold are unavailing. It has been held repeatedly that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a sale legally made. (Sargent v. Shumaker, *supra*, 193 Cal. 122, 129; Bank of America etc. v. Century, etc., Co., 19 Cal. App. 2d 194, 196; Crofoot v. Tarman, 147 Cal. App. 2d 443, 446, 447.) It can be stated positively that in this case, as in the case last cited, "there is nothing in the record to the effect that anything done or left un-

done by the trustee prevented the public from attending at the sale or in anywise discouraged bidding."

Finally, appellant contends that the defendant Title Insurance and Trust Company, trustee under the trust deed, had notice of appellant's interest in the property securing the debt. Appellant argues that the trustee was under a duty to give notice of the sale to the appellant on the basis of the trustee's relationship with appellant's predecessors in interest under general principles of trust law. The argument misconceives the legal incidents of a trust deed. An ordinary trust deed is little more than a mortgage with power to convey. (Bank of Italy etc. Assn. v. Bentley, 217 Cal. 644, 654.) "A trustee under a deed of trust does not assume the important obligations which in some instances are cast upon a trustee by operation of law." (Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510, and cases cited.) The trustee of a trust deed is not a trustee in the strict sense of the word. The role of such a trustee is more nearly that of a common agent of the parties to the instrument. (Pacific S. & L. Co. v. N. American etc. Co., 37 Cal. App. 307, 310.) Merely by virtue of its position as trustee, defendant was under no duty to give appellant special notice of the sale.

Appellant's notice of appeal indicates that the appeal is taken from the judgment and "from the orders after judgment." The quoted portion of the notice of appeal is wholly ineffective for at least two reasons: (1) It does not identify any "specified" order as required by Rule 1a of the Rules on Appeal. (Colden v. Broadway State Bank, 11 Cal. App. 2d 428.) (2) The only order after judgment contained in the record on appeal is a minute order dated March 1, 1957, which recites that plaintiff's motion for a new trial was abandoned and which denies

a motion to set aside the judgment. The motion to set aside the judgment recites that it was made "on the ground that the Court in its judgment made a mistake of fact in stating that there were no additional facts that could be alleged in an amended pleading, and upon the further ground that the court erred in holding that the complaint failed to state a cause of action and in sustaining an objection to the introduction of any evidence." Said motion further recites that it would be based upon the records and files and upon the affidavit of one of plaintiff's attorneys. The record before us does not contain either the affidavit or any other evidentiary matter offered in support of this motion, which, apparently, amounted to nothing more than a request that the trial court reconsider its original action. The order denying it therefore is non-appealable. (McKenna v. Elliott & Horne Co., 118 Cal. App. 2d 551.)

The judgment is affirmed and the purported appeal from the "orders after judgment" is dismissed.

HERNDON, *J.*

I concur:

Fox, *P. J.*

ASHBURN, *J.*, being disqualified, did not participate therein.

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IN THE

Supreme Court of the United States

October Term, 1958.
No. 321

LANCASTER SECURITY INVESTMENT CORPORATION, a California corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING & LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST COMPANY, *et al.*,

Appellees.

Motion of Appellees Howard M. Kessler and Title Insurance and Trust Company to Dismiss or Affirm.

GILBERT E. HARRIS,
433 South Spring Street,
Los Angeles 13, California,
Attorney for Appellees Howard M. Kessler and Title Insurance and Trust Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171

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IN THE

Supreme Court of the United States

October Term, 1958.
No. 521

LANCASTER SECURITY INVESTMENT CORPORATION, a California corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING & LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST COMPANY, *et al.*,

Appellees.

Motion of Appellees Howard M. Kessler and Title Insurance and Trust Company to Dismiss or Affirm.

Appellees Howard M. Kessler and Title Insurance and Trust Comany, hereby and herewith move the Court to dismiss the Appeal taken herein, and to affirm the Judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Two, a copy of which forms the Appendix to Appellant's Jurisdictional Statement, and base their Motions upon the following grounds, all as is specifically set forth in Rule 16 of this Court:

Grounds Upon Which Motions Are Made.

A.

Rule 16(1)a.

The Appeal is not within the jurisdiction of this Court because it is not taken in conformity to the Statutes or to the Rules of this Court (Rule 16(1)a).

The Appeal in this case—if it can be called such—was taken by means of a notice thereof contained in a telegram, all as will appear from the record filed in this Court. At the end of the telegram appears these printed words: "ATTORNEY MORRIS LAVINE ATTORNEY FOR LANCASTER SECURITY INVESTMENT CORPORATION, A CALIFORNIA CORPORATION."

In the Appendix to this Court's Rules appearing in 98 L. Ed. page 47, it is provided as follows: "The form and manner of signature of the Notice of Appeal should likewise comply with the Rules of the Court in which the Notice is to be filed." Rule 1 of the Rules on Appeal of the State of California, appearing in Vol. 36 Cal. 2d Reports, says: "The Notice shall be signed by the Appellant or his attorney." Nothing in the record indicates that either the Appellant or its attorney, Morris Lavine, signed any such notice. It is, of course, common practice to convey messages to a local telegraph office by a telephone call, either by the attorney or his secretary, which, of itself, negatives a "signature."

B.

Rule 16(1)b.

The Motion to Dismiss is also based on the ground that it does not present a substantial Federal question; or that the Federal question sought to be reviewed was not timely, or properly raised; or that the judgment rests on an adequate non-Federal basis (Rule 16(1)b). This Court will note from the record that in the Trial Court no constitutional questions whatsoever (either State or Federal) were raised. Such questions for the first time appear in Appellant's Opening Brief in the District Court of Appeal.

Section 1254(2) 28 U. S. C. A. provides that any such appeal as is here contemplated, precludes "review by Writ of Certiorari at the instance of such Appellant, and the review on appeal shall be restricted to the Federal questions presented."

On pages 4, 5, 6, 7, 8 and 9, of Appellant's Jurisdictional Statement, there is quoted the Fourteenth Amendment to the Constitution of the United States, Sections 2924 and 2924(b) of the Civil Code of the State of California, and Section 692 of the Code of Civil Procedure of the State of California. Although the heading of a statutory enactment probably is inconsequential nevertheless, the correct statutory heading of 2924(b), reads as follows: "REQUEST FOR COPY OF NOTICE OF DEFAULT AND SALE: FILING OF REQUEST: FORM AND CONTENTS: INDEX BY RECORDER: MAILING OF NOTICES: INCLUSION OF REQUEST IN INSTRUMENT: PUBLICATION OF NOTICE: RECITAL OF COMPLIANCE: EFFECT OF REQUEST."

Section 2924 of the Civil Code has been in force in the State of California since 1872 (86 years), with some minor amendments. Section 2924(b) of the Civil Code was enacted in 1933 (25 years) and a pertinent amendment was enacted in 1939; and Section 692 of the Code of Civil Procedure has been in force since 1872, with some minor amendments. It will be noted that Section 2924 of the Civil Code provides very specifically the steps to be taken in the foreclosure of a deed of trust (comparable, of course, to a "security deed" as is specifically referred to, hereinafter, in this Court's decision, in the case of *Scott v. Paisley,* 271 U. S. 632, 46 S. Ct. 591, 70 L. Ed. 1123). These steps are, in brief:

(1) That a notice of default must be recorded in the county in which the real property is situated, specifically naming the trustors, together with a description of the real property affected, and specifically setting forth the nature of the breach of the secured obligation and of the election of the beneficiary to cause the property to be sold to satisfy the obligation.

(2) That there must then be an elapse of three months.

(3) That there must then be given a Notice of Sale, setting the time and place thereof, in the manner provided by the provisions of Section 692 of the Code of Civil Procedure, which in turn provides

(4) That a Notice of Sale describing the property must be posted in one public place.

(5) That there must be a publication of said notice in a newspaper of general circulation once a week for a period of at least twenty days, and

(6) That a copy of said notice must be posted in a *conspicuous place on the property to be sold* at least twenty days before the sale.

Appellant, we contend, totally mis-construes the provisions of Section 2924(b) of the Civil Code, by claiming that some other or further notice should be given to Appellant. Section 2924(b) applies only to the particular situation it expressly covers, and by the terms of that section, it seeks to protect subsequent purchasers of encumbered property by permitting them to have specific registered mail Notice of Sale proceedings IF they comply with the provisions of that section.

This Court, we feel, will be quick to notice that the portion of that section referring to publication of a Notice "once a week for at least 4 weeks" applies simply, and solely, and only, by the express language of the Section to situations where NO address of the trustor or mortgagor is set forth in the deed of trust and where no request for notice has been recorded.

In this connection Appellant refers to Paragraph 7(b) of the Deed of Trust, which reads "This deed (referring, of course, to the Deed of Trust) applies to, inures to the benefit of and binds all parties hereto, their heirs, legatees, devisees, adminstrators, executors, successors and assigns."

Appellant *never was a successor or assignee* of any interest, whatsoever, in the Deed of Trust. Its purchase of the property after the Deed of Trust was recorded could not in any manner affect the Deed of Trust itself, and most certainly—as is expressly stated in cases hereinafter set forth—the entire purpose of Section 2924(b) was designed to relieve against the necessity of a Beneficiary, or a prospective purchaser at the sale, of examining perhaps a dozen deeds or other instruments of conveyance including estate proceedings in order to relieve himself of the responsibility of determining, at his peril,

who is the then true owner of the property. As has been heretofore pointed out, Appellant was thereby provided with an easy method to obtain specific notice, if he cared to avail himself of the provisions of that statutory enactment.

To refer, now to cited case law in the Jurisdictional Statement—Appellants seems to place great reliance upon the case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 94 L. Ed. 865. We submit that that case, in no way, substantiates appellant's position. The case—as this Court well knows—involves a notice to be given by the Trustee with respect to the settlement of its accounts as Trustee of a Common Trust Fund, which consisted of 113 separate trusts, approximately one-half of which were *inter vivos* and the other half testamentary. The Court in saying that personal service has never been regarded as an indispensable step to constitute due process, said specifically

> "We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us,"

and then said that

> "The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, 234 US 385, 58 L. ed. 1363, 34 S. Ct. 779, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly*, 176 US 398, 44 L. ed. 520, 20 S. Ct. 410, supra, and cf. *Goodrich v. Ferris*, 214 US 71, 53 L. ed. 914, 29 S. Ct. 580. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. The criterion is not the possi-

bility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

When it is realized that the notices required by the statutory enactments of the Sate of California (in effect since 1872) are so much more complete than the notice under consideration in the *Mullane* case, we feel that no other or better reasonable notice could be provided, and especially—with the enactment of Section 2924(b) of the Civil Code—a subsequent owner could very readily receive registered mail notices at whatever address he wished to state. To emphasize this situation, *a notice was posted on the subject property,* and it is but rudimental to say that the owner or its representative *would thereby obtain actual notice.*

In this regard it may be well, at this point, to call to the Court's attention the actual Deed of Trust involved herein, and the Trustee's Deed upon foreclosure, both of which constitute exhibits to the Appellees' answer in the lower Court. The Deed of Trust—which of course is a contract—provides in part as follows: "The recitals in such deed (meaning the trustee's deed) of any matters or facts, shall be conclusive proof of the truthfulness thereof." The trustee's deed upon foreclosure specifically states that notices of sale were posted for not less than 20 days prior to the date of sale in three public places in the City of Los Angeles (where the property is located), and that publication was had once a week for twenty days in a newspaper of general circulation in the Judicial District where the property is located, and that a copy of said notice was posted for that period of time "in a conspicuous place on the property to be sold."

C.

Rule 16 (1)c.

Appellees' Motion to Affirm the judgment sought to be reviewed is based "on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument" (Rule 16(1)c).

This Court has expressly passed upon the precise question here involved in the case of *Scott v. Paisley*, 271 U. S. 632, 46 S. Ct. 591, 70 L. Ed. 1123. As is sometimes glibly said, this is a "hog case" and not a "cow case." In this case the following situation was under consideration

> "In 1919 plaintiff purchased a parcel of real property which was subject to a security deed, which a previous owner had executed to secure a note for borrowed money. Thereafter, the holder of the note brought suit without any notice to the plaintiff and recovered judgment against the grantor in the security deed, and thereafter levied an execution upon the land, and after due advertisement sold it at public sale in satisfaction of the judgment. Plaintiff asserted that the sale was void on the ground that it violated due process and equal protection of the law clauses of the fourteenth amendment, *in that he could not be deprived of his property without notice or without an opportunity to be heard and set up a defense.*
>
> "The Supreme Court of Georgia affirmed, and this Court in holding that there was no violation of the Fourteenth Amendment stated, in that case, as follows:
>
> " 'Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject

to a mortgage or *trust deed, with a contractual power of sale.* The validity of such a contractual power of sale is unquestionable. In *Bell Silver & Copper Min. Co. v. First Nat. Bank*, 156 U. S. 470, 477, 39 L. Ed. 497, 501, 15 Sup. Ct. Rep. 440, this Court said: "There is nothing in the law of mortgages, *nor in the law that covers what are sometimes designated as trust deeds* in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and *if the sale is conducted in accordance with the terms of the power*, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance." In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale, *is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. McIver v. Smith*, 118 N. C. 73, 75, 23 S. E. 971; *Atkinson v. Washington & J. College*, 54 W. Va. 32, 49, 46 S. E. 253; *Grove v. Great Northern Loan Co.*, 17 N. D. 352, 358, 138 Am. St. Rep. 707, 116 N. E. 345; *Hardwicke v. Hamilton*, 121 Mo. 465, 473, 26 S. W. 342; *Ostrander v. Hart*, ... N. Y. ....., 30 N. E. 504. And see *Watkins v. Booth*, 55 Colo. 91, 94, 132 Pac. 1141; and *Groff v. Morehouse*, 51 N. Y. 503, 505. In *Hardwicke v. Hamilton*, 121 Mo. 473, 26 S. W. 342, the Court said that "the law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar subsequent or junior lien or incumbrance upon the same property of his intention to sell the property under his mortgage or deed of trust. All that is required of him is to advertise and sell the property according

to the terms of the instrument, and that the sale be conducted in good faith." And in *Watkins v. Booth, supra*, 94, the court said that it was the *duty of the subsequent lienor "to keep advised as to proceedings in case of the former trust deed."* So a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. *There is no established principle of law which entitled such a purchaser to notice of the exercise of this power. And Section 6037 neither deprives him of property without due process of law nor denies him the equal protection of the laws.'*

"Again in the case of *Bell Silver & Copper Mining Co. v. First Nat. Bank,* 156 U. S. 470, 477, and 39 L. Ed. 497, at page 501, this court said:

" 'There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as *trust deeds* in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and if the sale is conducted in accordance with the terms of the power the title to the premises granted in that way of security passes to the purchaser upon its consummation by a conveyance. *Grant v. Burr,* 54 Cal. 298; *Bateman v. Burr,* 57 Cal. 480. The power of sale in the indenture, whether we call it a *deed of trust* or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and if he does not *choose* to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the property, to obtain payment of the indebtedness. The insertion of a power of sale does

not affect the mortgagor's right to redeem so long as the power remains unexecuted and the mortgage is not, *as it may be*, foreclosed in the ordinary manner, but when a sale is made of the interest of the mortgagor, his right is wholly divested, embracing his equity of redemption.'"

The Circuit Court of Appeals (9th) which, of course, has jurisdiction over matters which arise in the Western States, including the State of California, has very specifically upheld the constitutionality of Section 2924 of our Civil Code on at least two occasions. In the case of *Davidow v. Lachman Bros. Inv. Co.* (1935), 76 F. 2d 186, the pertinent language of the Court reads

"'It is clear from the allegations of the bill and from the argument advanced on behalf of Appellant that the claim of violation of due process of law is based solely on the action of the various appellees in proceeding as they have under the power conferred by the deeds of trust and under what is asserted to be an erroneous interpretation of the statutes in question. *Neither the State of California nor any of its agencies or officers is charged with depriving appellant of his property without due process of law.* Under such circumstances, the allegations of the bill were insufficient to confer jurisdiction, for it is well settled, as said in *Kiernan v. Multnomah County* (C. C.), 95 F. 849, that: "The Fourteenth Amendment has reference exclusively to *State action, and not to any action by individuals.* It is a prohibition upon the State to 'make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' or which shall 'deprive any person of life, liberty, or property without due process of law.' It prohibits State legislation in violation of these rights. It does not refer to any action by

private individuals. (*Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; Civil Rights Cases, 109 U. S. 3, 11, 3 S. Ct. 18, 27 L. Ed. 835), otherwise every invasion of the rights of one person by another would be cognizable in the federal courts under this Amendment.'"

"Again in the case of *Curti v. Pacific Mtg. Guaranty Co.* (1936), 87 F. 2d 42, 43, our Circuit Court of Appeals again said:

"'Reversal is sought of a judgment of dismissal of a complaint challenging the sale of real estate hypothecated to secure payment of money at a stated time by virtue of a power of sale contained in the agreement of hypothecation pursuant to the provisions of Section 2924 of the Civil Code of California, charging that said section violated the "due process" clause of the Constitution of the United States (Const. Amend. 14), the hypothecation being made for security only, and that the procedure to enforce the contract must be by judicial procedure and sale upon execution by decree of court. No contention is made that the power of sale was not in all things strictly pursued.

"'(1) This section of the statute entered into and became a part of the deed of hypothecation as fully as if set out therein. It is not contended that the power of sale was not set out in the instrument, nor that the requirements of the Section 2924, *supra*, were not in detail performed.

"'(2, 3) *That the trustor has power to confer upon the trustee, who may be the obligee to the deed of trust, the power to sell in accordance with the terms of the power given and a sale so made passes good title to the property so sold has long since been judicially determined. Fogarty v. Sawyer*, 17 Cal. 589; *Bell Silver & Copper Mining Co. v. First Na-*

tional Bank, 156 U. S. 470, 15 S. Ct. 440, 39 L. Ed. 497; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480. The *"due process" clause is not violated by the provisions of section 2924, supra.*

"'(4) That valid title passed on execution of such contractual power is unquestionable. *Scott v. Paisley*, 271 U. S. 632, 46 S. Ct. 591, 70 L. Ed. 1123. This is a case where the constitutionality of a like statute of Georgia was attacked.'"

This Court has determined that the decisions of the California Courts over many, many years, have established "rules of property," which are to be treated as law by the Federal Courts.

"We quote the following general language in *Bucher v. Cheshire R. Co.* (1888), 125 U. S. 555, 583, 31 L. Ed. 795, 8 Sup. Ct. Rep. 974 (see Vol. XII California Law Review, page 427). The Court said

"'It is also well settled that where a course of decisions, whether founded upon statutes or not, *have become rules of property as laid down by the highest courts of the State*, by which is meant those rules governing the descent, transfer, *or sale of property*, and the rules which affect the title and possession thereto, they are to be treated as law of that State be the Federal Courts.'"

To show how the California Courts have established this rule of property in very explicit language, we set forth quotations from a text and a few of the many California cases which are here pertinent

"It is generally said in 34 California Jurisprudence 2d, 128-129:

"'Not less than 3 months after notice of default is given, the trustee, mortgagee, or beneficiary must

give notice of sale, stating the time and place thereof in the manner required for sales of real property on execution. A notice that does not meet the statutory requirements is invalid. *But no additional notice need be given. Except where he formally requests notice, the fact that the debtor is not personally notified is immaterial, so long as there is compliance with the conditions prescribed in the statute.'*

"In *Sargent v. Shumaker* (1924), 193 Cal. 122, 130, the Court's language is:

" 'The circumstance that the plaintiff did not know of the pending sale and was not notified thereof by either of the defendants is not, standing alone, of any importance herein. As this Court said in *Rauer v. Hertweck* (1917), 175 Cal. 278, 282: "There was no obligation upon them to give him any such notice. The statute defines how notice of an execution sale must be given. To say that a sale may be set aside because some other notice was not given *would be to amend the statute, and this we cannot, of course do.* When the officer conducting the sale has done the acts prescribed by the code, he has done his full duty. He is not required to search for the debtor and give him any further notice than that which the law exacts. Nor is any such duty imposed upon the judgment creditor. *Much less is one who may contemplate bidding at an execution sale called upon to concern himself with, the question whether the debtor has actual knowledge of the proceedings.*" '

"*Sargent v. Shumaker, supra,* involved an attack upon a trustee's sale by the administrator of the deceased trustor (debtor) who raised numerous contentions including lack of actual notice. The Court held for the defendant, reversing the trial court and concluded at page 137:

" 'These circumstances serve to bring this case fairly within the rule of *Rauer v. Hertweck, supra,*

which was summed up in the following language: "The attempt to show unfairness in the sale comes down simply to this: that the execution sale was *regularly made upon due statutory notice*, but that the judgment debtor did not, in fact, know of the sale, and no one gave him notice of it. He did, however, know that a judgment had been entered against him, and must be deemed to have known that his property might be levied on at any time. *He failed to pay the judgment*, and took no steps to protect his property until many months after the entry of judgment. He then found that a sale had been had, and that the time for redemption had expired. The resulting loss can more properly be attributed *to his neglect of his own interests* than to any unfairness on the part of the judgment creditor or the purchasers.'"

"In *Billings v. Farm Development Co.* (1925), 74 Cal. App. 254, 263-264, the Court stated:

"'The publication was in strict accord with the statute and the contract and the beneficiary was a lawful purchaser under the contract . . . It is also argued that the plaintiffs *should have been given personal notice of the sale. But such notice was not necessary and the failure to give it is not actionable.* (*Sargent v. Shumaker*, 193 Cal. 122, 130; *Babcock v. Brown*, 193 Cal. 345, 353.)'

"Again in *Ley v. Babcock* (1931), 118 Cal. App. 525, the appellants (trustors) contended that the Court erred in striking out their affirmative defense which pleaded that the sale was fraudulently made because personal notice had not been given them. The Appellate Court ruled against this contention, stating at page 528:

"'The Trial Court found that notice was given in full compliance with the terms of the deed of trust

and with the provisions of Section 692 of the Code of Civil Procedure. It was *not at any time necessary that personal notice be served upon the appellants;* it is sufficient if the statute and the terms of the trust deed are followed. (*Witter v. Bank of Milpitas,* 204 Cal. 570, 573.)'

"See also:

Meyer v. Zuber (1928), 92 Cal. App. 767, 772-773.

"A recent case in this regard, *Crofoot v. Tarman* (Jan. 7, 1957), 147 Cal. App. 2d 443, 305 P. 2d 56, carefully reviews the many cases in this State which deal with this subject. In this case, plaintiff had inquired of the secretary of the beneficiary as to the date of the sale and was erroneously told by her that the sale had been postponed to a certain date. There was no evidence that the misinformation was fraudulently given. The Court specifically held that where there was no proof that anything was done or left undone by the trustee, *that the inadequacy of price would not form a basis for the exercise of the Court's equity powers to set the sale aside.* The specific language of the Court is as follows:

" 'Turning now to the alleged irregularities in the sale and their effect upon the sale, Crofoot argues concerning the fact and the effect of the misinformation as to the date of sale which emanated from the secretary of Tarman's attorney. It appears that they do not in fact claim there were irregularities in the trustee's conduct of the sale, nor that anything done or left undone by the trustee was in violation of the trustee's authority or contrary to the trustee's duties.'

"And further:

" 'There is nothing in the record to the effect that anything done or left undone by the trustee *prevented*

the public from attending at the sale or in anywise discouraged bidding. Therefore, the trustee's sale cannot be set aside by reason of irregularities plus inadequacy of price.'

"It is most significant that learned counsel for the Appellant in this case has not even mentioned any California cases which are here apposite."

Lastly—although Appellant has fully quoted provisions of Section 2924b of the Civil Code—he totally ignores the provision contained in that section with respect to the recitals which are contained in the trustee's deed, all as was hereinabove briefly mentioned. To conclude this portion of our authorities in support of our motions and in support of the "rules of property" established in the State of California, with respect to that portion of that Code Section, we set forth a few California cases which expressly cover the situation:

"It is said in the case of *Central National Bank v. Bell*, 5 Cal. 2d 324, at 327:

" 'The defendants on the trial endeavored to show that the notices required by Section 692, subdivision 9, Code of Civil Procedure, did not *remain* posted for twenty days prior to the date of sale. The evidence was held inadmissible and excluded by the Court. The Court did not err in its ruling. It is sufficient in this respect to note that the trust deeds *provided that in event of sale thereunder, the recitals in the trustees' deeds, of default, request to sell, publication and posting of notice, postponements of sale, etc. should be conclusive evidence of all such facts recited.* In this action and on the record before us the defendants were concluded by the recitals in the trustee's deeds. (*Sorensen v. Hall*, 219 Cal. 680 (28 Pac. (2d) 667); *Stevens v. Plumas Eureka Annex Min. Co.*, 2 Cal. (2d) 493 (41 Pac. (2d) 927).)'

"Similarly, it was held in the case of *Cobb v. California Bank*, 6 Cal. 2d 389, at 390, as follows:

" 'The second point is equally untenable. The deed of trust under which the property was sold *contains the usual recitals that the recitals in the trustee's deed of any matters of fact affecting the regularity or validity of the foreclosure sale shall be conclusive proof of the truthfulness thereof, and that said trustee's deed shall be conclusive against all persons as to all matters of fact therein recited.* The trustee's deed recites that a copy of the notice of trustee's sale was posted in a conspicuous place on the property to be sold. *The appellants herein were concluded by these recitals in the trustee's deed.* (*Sorensen v. Hall*, 219 Cal. 680 (28 Pac. (2d) 667); *Central National Bank of Oakland v. Bell*, 5 Cal. (2d) 324 (54 Pac. (2d) 1107).)'

"An express agreement with respect to such recitals is not violative of any of the Sections of our Civil Code applicable thereto. Our Court said in *Pierson v. Fischer* (1955), 131 Cal. App. 2d 208, at 216:

" 'Appellant contends that to hold the recitals in the Trustee's deed be conclusive against him is to violate the provision of Section 2935 of the Civil Code which declares: "Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, mortgage or other instrument creating a lien on real property, whereby the borrower agrees to waive the rights, or privileges conferred upon him by Sections 2924, 2924b, 2924c of the Civil Code, or by Sections 580a or 726 of the Code of Civil Procedure, shall be void and of no effect," and still further,

"'The argument is not sound, for the reason that the provisions in the deed of trust here in question *do not result in a waiver* of the rights or privileges conferred by the Civil Code sections referred to. Those sections, speaking generally, establish certain procedures in the exercise of powers of sale conferred by deeds of trust and in the remedies of the beneficiary. And concerning all of them, appellant, by the instrument he executed, declared that the recitals in a deed made by his trustee that all of the duties of the trust respecting the sale had been complied with should bind him. In short, *he thereby made the trustee his agent* with such powers that the trustee could bind him, notwithstanding he had not carried out the provisions of his trust.'

"See also *Karrell v. First Thrift of Los Angeles* (1951), 104 Cal. App. 2d 536, and two recent cases bearing the same title *Abrahamer v. Parks* (April, 1956), 141 Cal. App. 2d 82, and 85."

The Court is well aware that in order to invoke the jurisdiction of the Court, the lower Court's decision must be based *squarely* on the fiinding that State statutes are contrary to Federal law. In this connection it is said in the text entitled Supreme Court practice (2d Ed.), by Stern and Gressman, on page 17, as follows:

"In order for this jurisdiction to be invoked, the Court of Appeal's decision must be based *squarely* on a finding that a State Statute relied upon by Appellant is contrary to Federal law. If the decision rests upon State law grounds, appeal is improper. Public Service Commission v. Batesville Telephone Co., 284 U. S. 6."

and further:

"A 'State statute' in this context means every legislative action to which a State gives the force of

law. See Williams v. Bruffy, 96 U. S. 176, 183; King Mfg. Co. v. Augusta, 277 U. S. 100, 104."

Once again, in the same text, at page 58 we find the following:

> "It shall be emphasized that in respect to the construction of State Statutes, the State Court's views *are completely non-reviewable* by the Supreme Court. If the sole basis of the decision is one of construction, the case cannot be the subject of either appeal or certiorari. And where the validity of the statute has been sustained in the face of federal objections, the Supreme Court on appeal must accept the State Court's construction of the Statute and proceed to test the validity on that basis. *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513."

In the case just cited, this Court was called upon to set aside a Connecticut State decision upholding the imposition of a succession tax imposed by the State. In speaking for the Court, Mr. Justice Sutherland said:

> "We are not at liberty to disregard the explicit holding of the state court as to the basis of its decision, except for convincing reasons, which here we are unable to find. Compare *Columbia R. Gas & E. Co. v. South Carolina*, 261 U. S. 236, 245-247, 67 L. ed. 629, 633, 634, 43 S. Ct. 306. The entire effort of the court upon this point plainly was directed towards sustaining the view that the event sought to be taxed fell within the provisions of the act of 1923. There is a reference to the act of 1929, but the decision is definitely put upon the act of 1923, and is supported by considerations of such weight as to leave no occasion for dependence upon the later act; and the supposition that in fact effect was given to it is without warrant. Since the court below construed the act of 1923, without regard to

the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court *as though the meaning as fixed by the court had been expressed in the statute itself in specific words. Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U. S. 358, ante, 360, 53 S. Ct. 145, 85 A L. R. 254; *Supreme Lodge, K. P. v. Meyers*, 265 U. S. 30, 32, 68 L. ed. 885, 887, 44 S. Ct. 432."

And, lastly, we are of the belief that Appellant by taking this Appeal has elected the wrong remedy, if perchance it has one, for it is well said in the text just mentioned on page 19:

> "The only safe way to avoid unlitigated hazards just mentioned, in a case which involves other issues which the Supreme Court might be induced to review, is for Appellant to discard his right of appeal and to confine himself to an application for certiorari."

Comment on Appellant's Jurisdictional Statement.

We are somewhat concerned about the sincerity of Appellant and its attorney as to some bold assertions made in the Jurisdictional Statement. On page 11, thereof, he states that the provisions of Section 2924b "must be read into the contract and purchase and the failure to so publish voids the transaction." Again on page 13 it is said:

> "It follows, then, that Section 2924b of the Civil Code, inherently and as construed and applied in this case violates the Fourteenth Amendment to the United States Constitution. The court below has construed the statute to *require no notice to the new purchaser of property upon a sale* under a deed of trust if the new purchaser did not file any request with the county recorder."

Again on page 14, with specific regard, again, to the provisions of Section 2924b, he says that that Section

> "required specific notice by publication at least four weeks *before there could be any valid transfer or sale of the property and without which there was inadequate notice.* Construed otherwise this section would be violative of the due process clause of the Fourteenth Amendment requiring adequate notice."

We challenge Appellant's attorney in his Rely Brief (Rule 16(3)) to point out ONE WORD in Section 2924b that has *anything whatsoever to do with the purchase, transfer or sale of property* or that there could be no *valid sale or transfer of property* without notice. It is quite unthinkable that learned counsel would ask this Court to rewrite that Section to make it applicable to a transfer or sale of real property. Appellant purchased the property here involved SUBJECT to the deed of trust. It was most certainly aware of the delinquencies in payment of the indebtedness secured thereby, which, in the usual course of events, brought about a foreclosure sale. The record discloses that the purchaser at the sale was a total stranger—not the beneficiary of the deed of trust.

It is respectfully submitted that either Appellees' motion to dismiss or their motion to affirm be granted.

GILBERT E. HARRIS,
Attorney for Appellees, Howard M. Kessler and Title Insurance and Trust Company.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 521

LANCASTER SECURITY INVESTMENT CORPORATION, a California Corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING AND LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST COMPANY, *et al.,*

Appellees.

ANSWER TO MOTION TO DISMISS OR AFFIRM.

MORRIS LAVINE,
215 West Seventh Street,
Los Angeles 14, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 521

LANCASTER SECURITY INVESTMENT CORPORATION, a California Corporation,

Appellant,

vs.

HOWARD M. KESSLER, STATE MUTUAL BUILDING AND LOAN ASSOCIATION, and TITLE INSURANCE AND TRUST COMPANY, *et al.*,

Appellees.

ANSWER TO MOTION TO DISMISS OR AFFIRM.

Comes now Lancaster Security Investment Corporation, a California corporation, and in answer to the motion to dismiss or affirm, sets forth as follows:

Counsel for appellee have overlooked the more recent decisions of this court respecting notice. These cases are:

Walker v. Hutchinson (Dec. 10, 1956), 352 U. S. 112;

Covery v. Somers, 351 U. S. 141;

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306;

New York v. New York, N. H. & H. R. Co., 344 U. S. 293.

It is conceded in the case before this court that:

1. Appellant received no notice from appellee by letter, telephone, telegraph, or in person from appellees.

2. Appellee was the same trustee that handled the original deal and was on direct notice that appellant had purchased the property and that appellant was notified that said property was transferred to plaintiff and that plaintiff assumed the payment of the obligation under said deed of trust and was further notified that plaintiff's address was "Box 987, Lancaster, California."

3. That the deed of trust contains paragraph 7b providing that "this deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors, and assigns."

4. The original deed of trust requests notice by the original trustor, who, with knowledge of the trustee, sold the property to the appellant.

This court said in *Walker v. Hutchinson,* 352 U. S. 112, 115:

> "In Mullane v Central Hanover Bank and Trust Co., 339 U. S. 306 we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of the proceedings which may directly and adversely affect their legally protected interest.
> . . .
>
> "Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of the proceedings against his property. In Mullane we pointed out many of the

infirmities of such notice and emphasized the advantage of some kind of personal notice to the interested parties. In the present case there seems to be no compelling or even persuasive reason why such direct notice cannot be given. Appellant's *name was known to the city and was on the official records.* Even a letter would have apprised him that his property was about to be taken and that he must appeal if he wanted to be heard as to its value.

"Nothing in our prior decisions requires a holding that newspaper publication under the circumstances here provides adequate notice of a hearing to determine compensation."

Likewise in our case the trustee had the name and address of the appellant in its files. It is a matter of common knowledge that it is the business of title companies to keep a full and complete record of change of ownership of property. The official records of the county recorder also record such changes.

The complaint alleges, and appellee does not and cannot deny that appellees were informed that the address of appellant as Box 987, Lancaster.

A simple letter, addressed to appellant, would have put it on notice that his $60,000 property was about to be sold for non-payment of a sum less than $2000. The sale of this property for $3000 without notice to the known owner violates due process of law guaranteed by the Fourteenth Amendment, United States Constitution. As stated in *Walker v. Hutchinson* "In the present case there seem to be no compelling or even persuasive reasons why direct notice cannot be given. Appellant's name was known to the city (in our case to appellee) and was on the official records. (In our case on the appellee's own records.)

Even a letter would have apprised him" etc. The same is true in our case.

The ancient *Paisley* case has been outmoded by the recent cases of this court cited above.

Appellee contends that a notice of the sale was posted on the property. It is not contended that appellant occupied the property, nor even saw or heard of the sign.

Although appellant contended in the court below that he was entitled to at least four weeks notice by publication under the provisions of Section 2924B, Code of Civil Procedure, the court below held otherwise even by publication, and that twenty days was enough publication. But any notice by publication, whether twenty days or four weeks "Is a poor and sometimes a hopeless substitute for actual service of notice." Its justification is difficult at best.

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306.

Appellees under their point A raise the question as to whether the telegraphic notice of appeal, duly filed with the clerk of the District Court of Appeal, and concurrently wired also to them from San Francisco, where counsel was appearing before the United States Court of Appeals for the Ninth Circuit complied with the rules. The court below duly accepted and acted upon the telegraphic notice of appeal as complying with Rule 10 of this court. So did appellee, who counter-designated the record on appeal and amplified it to include briefs below, without objection. Both the clerk of the District Court and the presiding judge of that court accepted the notice as adequate. Counsel for appellant personally prepared the notice of appeal and personally filed it in the Western Union office in San Francisco, directed both to the clerk of the District Court

of Appeal of the State of California and to opposing counsel. No "secretary" was along. Upon his return to Los Angeles counsel went to the clerk's office and requested the clerk to sign the wires, and was informed by the clerk that it was unnecessary, that the telegraphic signature was sufficient compliance. The jurisdictional statement bears appellant's counsel's signature.

Notice to the court and counsel was far more adequate that appellee's client gave to appellant before it sold his $60,000 property for $3,000 without a telegram or letter or personal notice to him.

Counsel for appellee "challenges" appellant's counsel to point out "one word in Section 2942b" . . . "that there could be no valid sale or transfer of property without notice."

That is a basic requirement in every sale or transfer, under the Fourteenth Amendment to the Constitution of the United States, before one's property may be taken or sold. Notice—adequate and proper notice—is the owner's just due.

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306;

Covery v. Somers, 351 U. S. 141;

Walker v. Hutchinson, 352 U. S. 112.

Insofar as Sections 2924 and 2924b disregard that basic right they violate due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

The courts below held *no* notice was required. Inherently and as thus construed and applied the sections therefore violate the Fourteenth Amendment, United States Constitution.

We pray that this court should reverse the judgment below *per curiam* on the basis of *Mullane v. Central Hanover Bank, Covery v. Somers* and *Walker v. Hutchinson, supra*, or note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.